BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

EARNESTINE MCCOY	)	
Claimant	)	
VS.	)	
	)	
SCHOOL SERVICES & LEASING, INC.	)	Docket No. 251,163
Respondent	)	
AND	)	
	)	
ONE BEACON AMERICA INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant appealed the October 22, 2003 Award entered by Administrative Law Judge (ALJ) Jon L. Frobish. The Appeals Board (Board) heard oral argument on March 16, 2004.

APPEARANCES

Roger A. Riedmiller of Wichita, Kansas, appeared for claimant. Douglas C. Hobbs and Janelle Jenkins Foster of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board considered the record and adopts the stipulations listed in the Award.

ISSUES

Claimant worked for respondent as a school bus driver. The ALJ found that claimant suffered a work-related back injury on December 6,1999, while removing snow and ice from the windows of her bus. However, the ALJ further found that claimant only

suffered a temporary aggravation of a preexisting condition with no additional permanent impairment nor disability. Accordingly, the Award was limited to medical treatment.

Claimant alleges she suffered a permanent injury and is entitled to permanent partial disability compensation based on a 39 percent work disability. Claimant contends she has a 58 percent task loss and is entitled to a 20 percent wage loss. The requested wage loss accepts an imputed wage of $270 per week as her post-accident ability to earn wages.[1]

Conversely, respondent contends that the ALJ's Award should be affirmed. In the alternative, should the Board find claimant suffered any permanent injury, respondent contends claimant's award should be limited to her impairment of function. Respondent argues claimant is not entitled to an award of work disability because she is capable of returning to her former job as a school bus driver and earning a comparable wage.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes that the ALJ's Award should be modified. Claimant suffered a five percent impairment of function. However, claimant refused to return to work with respondent in a job which was within her restrictions. Accordingly, the post-injury wage claimant would have earned with respondent will be imputed to her. As this wage was more than 90 percent of the average weekly wage claimant was earning at the time of this accident, she is precluded from receiving a permanent partial disability award in excess of the percentage of her functional impairment.

Claimant injured her low back on December 6, 1999. This injury resulted from an accident that arose out of and occurred in the course of her employment with respondent. Dr. John McMaster opined that claimant's diagnosis corresponded with the DRE categories I and II of the *AMA Guides* and, therefore, claimant has a five percent whole body impairment.[2] However, he did not relate this impairment to the claimant's work-related accident. Dr. McMaster concluded that claimant's back injury was a temporary aggravation of a preexisting condition. Dr. McMaster released claimant without restrictions in September of 2000.

Dr. Paul Stein examined claimant for the first and only time on August 2, 2002. He likewise rated claimant's impairment of function at five percent to the whole person However, Dr. Stein attributed claimant's impairment to the work-related injury as a

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[1] Actually, comparing $270 a week to the average weekly wage of $345.95 found by the ALJ results in a 22 percent wage loss, not a 20 percent wage loss.

[2] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

permanent aggravation of claimant's preexisting condition. Although Dr. Stein initially recommended claimant avoid driving a school bus, he subsequently revised his opinion after reviewing evidence concerning the operation of the mini-bus with power steering and power brakes. Dr. Stein opined that claimant should be able to drive the mini-bus, especially if the driving was on reasonable road surfaces. His concern was that bouncing or jarring such as on bad roads would aggravate claimant's symptoms. Dr. Stein explained that there was a difference between advising someone to avoid doing something that causes them pain versus placing a permanent work restriction. Dr. Stein said, "[t]he biggest reason for placing a restriction is to avoid an activity that is likely to cause permanent harm or structural damage."[3]

Dr. Pedro Murati described claimant's injury as an annular tear that developed into a bulge that has gotten progressively worse with spinal stenosis and bilateral radiculopathy. Dr. Murati attributed this injury and process of worsening to the December 6, 1999 accident "and each working day thereafter during the patient's employment with [respondent]."[4] Dr. Murati believed the claimant's three (3) MRIs performed approximately one year apart showed a progression of spinal stenosis. He rated claimant as having a 20 percent impairment to the body as a whole based upon the DRE lumbar sacral category IV of the *Guides.* He recommended permanent restrictions based on an eight hour work day of occasional sitting, climbing stairs, ladders, squatting, driving and rarely bending at the waist. He also recommended no crawling and no more than 10 pounds of lifting, carrying, pushing or pulling and to only do so occasionally. Also, she should limit frequent lifting, carrying, pushing or pulling five pounds. She could frequently stand and walk but should alternate standing and walking. He further recommended no bus driving. Dr. Murati examined claimant on November 13, 2002. Claimant failed to tell Dr. Murati about her September 27, 2002 motor vehicle accident. He was, therefore, unable to differentiate what injuries were work-related and what may have been due to the subsequent motor vehicle accident. Nevertheless, after considering claimant's testimony about the motor vehicle accident and reviewing the hospital emergency room record, Dr. Murati concluded that the motor vehicle accident was not significant.

Dr. Anthony Pollock likewise rated claimant at five percent to the body as a whole based upon the *Guides*. But Dr. Pollock also gave a rating of zero percent. This variance was based upon some confusion about whether claimant had an EMG test that was positive for L5 nerve root irritation. In either case, Dr. Pollock believed claimant could return to her former job driving a mini-bus.

In addition to the 22.71 weeks of temporary total disability (TTD) compensation that respondent paid, claimant argued in her submission brief to the ALJ that she was off work

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[3] Stein Depo. at 21.

[4] Murati Depo. at 9.

and is entitled to receive temporary total disability compensation for the period from February 21, 2001 through August 2, 2002, when she was determined by Dr. Stein to have reached maximum medical improvement and released to return to gainful employment. Although TTD was neither argued nor listed as an issue in Claimant's Request for Review or in claimant's brief to the Board, it was made an issue before the ALJ and was argued in claimant's submission letter to the ALJ. And claimant incorporated that submission letter by reference into her brief to the Board. Accordingly, the Board considered claimant's argument that she is entitled to this additional period of TTD compensation but finds that it should be denied. Neither Dr. Stein nor any other physician who testified in this case said that claimant was unable to work during the period from February 2001, when she stopped working for respondent, and August 2, 2002, when Dr. Stein first saw her and said she was at maximum medical improvement for this injury. The record fails to prove that claimant was unable to engage in substantial gainful employment during this period.[5]

Respondent offered to return claimant to a job driving a mini-bus. Claimant attempted to perform this job for a couple of days but said she could not do it due to pain. The Board finds that the greater weight of the evidence supports a finding that claimant was capable of performing this job. As such, claimant's conduct was tantamount to a refusal to perform appropriate work as in *Foulk*[6] or a failure to make a good faith effort to retain appropriate employment as described in *Copeland.*[7] Accordingly, the wages she would have continued to earn had she continued working for respondent should be imputed to her. As this was at least 90 percent of the average weekly wage claimant was earning at the time of her accident, her permanent partial general disability award is based upon her permanent functional impairment.[8]

Award

WHEREFORE, the Award of Administrative Law Judge Jon L. Frobish dated October 22, 2003, is modified as follows:

The claimant is entitled to 22.71 weeks of temporary total disability compensation at the rate of $230.64 per week or $5,237.83 followed by 20.36 weeks of permanent partial disability compensation at the rate of $230.64 per week or $4,695.83 for a five (5) percent functional disability, making a total award of $9,933.66.

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[5] K.S.A. 44-510c(b).

[6] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[7] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[8] *See Ramirez v. Excel Corp.,* 26 Kan. App. 2d 139, 979 P.2d 1261, *rev. denied* 267 Kan. 889 (1999).

As of July 16, 2004, there would be due and owing to the claimant 22.71 weeks of temporary total disability compensation at the rate of $230.64 per week in the sum of $5,237.83 plus permanent partial disability compensation at the rate of $230.64 per week in the sum of $4,695.83 for a total due and owing of $9,933.66, which is ordered paid in one lump sum less amounts previously paid.

The Board adopts the remaining orders of the Administrative Law Judge to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of July 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and Insurance Carrier
Jon L. Frobish, Administrative Law Judge
Paula Greathouse, Workers Compensation Director